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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

UNITED STATES OF AMERICA, PETITIONER

v.

UMBERTO ANASTASIO, ALSO KNOWN AS ALBERT ANASTASIA

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States of America, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Third Circuit, reversing and vacating the judgment of the United States District Court for the District of New Jersey, which held that respondent had illegally and fraudulently procured his certificate of naturalization and ordered the certificate to be cancelled (R. 23).

OPINIONS BELOW

The opinions in the Court of Appeals, set forth in the Appendix, *infra*, pp. 22–49, are reported at 226 F. 2d 912. The findings of fact and conclusions of law of the District Court appear in the

record (R. 12–27) and are reported at 120 F. Supp. 435.

JURISDICTION

The judgment of the Court of Appeals was entered on September 19, 1955 (Appendix, *infra*, p. 47). A petition for rehearing was denied on November 16, 1955 (Appendix, *infra*, p. 48). The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether estoppel may preclude revocation of a naturalization certificate for fraud on the theory that the executive and the naturalization court are to be held to constructive notice of information available to immigration officials from which they should have deduced fraud on the part of the applicant for citizenship.

2. Whether respondent practiced fraud in procuring his naturalization when he swore that he had been lawfully admitted to the United States, when in fact he had entered as a deserting seaman, and incorporated by reference into his petition for naturalization a certificate of arrival (required to be attached to the petition) to prove lawful entry, which was based upon a fraudulent record of registry obtained by concealment of his criminal record.

3. Whether respondent's naturalization was illegally procured.

STATUTE INVOLVED

Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. (1946 ed.) 738 (a), provided:

> It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and cancelling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

STATEMENT

On December 9, 1952, the United States instituted proceedings under Section 338 (a) of the Nationality Act of 1940, *supra*, to set aside the decree naturalizing the respondent and to cancel his certificate of naturalization on the ground that they had been illegally and fraudulently procured (R. 1–6).

The pertinent facts may be summarized as follows:

On September 12, 1917, respondent arrived at the Port of New York as an "aspiring seaman" aboard a ship of foreign registry (R. 199). He failed to return to the ship after a grant of shore

leave and was listed as a deserting seaman (R. 199). Thereafter, he made his home in the United States.

On April 4, 1931, the respondent made application for a record of registry under the Act of June 29, 1906, 34 Stat. 596, as amended by the Act of March 2, 1929, 45 Stat. 1512[1] (R. 162–165).

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[1] The Act of June 29, 1906, as amended by the Act of March 2, 1929, 45 Stat. 1512, provided in pertinent part:

"SEC. 1. That (a) the registry of aliens at ports of entry required by section 1 of the Act of June 29, 1906, * * * as amended, may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner General of Immigration, in accordance with regulations prescribed by the Commissioner General of Immigration, with the approval of the Secretary of Labor, that he—

"(1) Entered the United States prior to June 3, 1921;

"(2) Has resided in the United States continuously since such entry;

"(3) Is a person of good moral character; and

"(4) Is not subject to deportation.

* * * * *

"SEC. 2. Upon the making of a record of registry as authorized by section 1 of this Act, the certificate of arrival required by the fourth paragraph of the second subdivision of section 4 of such Act of June 29, 1906, as amended, may be issued upon application to the Commissioner of Naturalization, in accordance with regulations prescribed by the Commissioner of Naturalization, with the approval of the Secretary of Labor, and upon payment of the fee prescribed by section 5 of this Act.

"SEC. 3. For the purposes of the immigration laws and the naturalization laws an alien, in respect of whom a record of registry has been made as authorized by section 1 of this Act, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry."

In his notarized application, he stated in part: "I have never (either in the United States or any other country) been arrested, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public ordinance" (R. 165). On May 5, 1931, before an immigration inspector, the respondent testified under oath that he had never been arrested or subjected to criminal or civil prosecution (R. 169). The record of registry was granted on the basis of respondent's sworn statements, testimony of two character witnesses, and an investigation report which showed only the fact of respondent's illegal entry in 1917 and his residence in the United States since 1917 (R. 160–177). At the time respondent made his sworn statements, oral and written, that he had not been arrested, convicted or imprisoned, he had been arrested three times for homicide, once on a charge of felonious assault, and once on a charge of unlawful possession of a revolver, for which crime he was convicted and sentenced to a term of imprisonment (R. 181, 200–201, 211–216). At the time he made his statements, he had been tried and convicted by a jury for murder in the first degree although the judgment was subsequently reversed and the indictment thereafter dismissed because the witnesses had disappeared (R. 213).

On October 30, 1931, respondent filed in the United States District Court for the Eastern District of New York a declaration of intention to become a citizen of the United States. On November 16, 1933, he filed a "Preliminary Form for Petition for Citizenship" (R. 205) in which he answered in the affirmative a question as to whether he had ever been arrested or charged with violation of law. The particulars he gave were that he had been convicted of a misdemeanor in 1923 involving traffic violations. On December 27, 1933, respondent filed his "Petition for Citizenship" to which was appended a certificate of arrival[2] based upon the fraudulent registry proceedings in 1931 (R. 218–220). On March 1, 1934, he gave to the government an affidavit in which he admitted that he had concealed his criminal record from a naturalization examiner on December 27, 1933 (R. 181). The affidavit did not mention the fact that respondent had also concealed his criminal record in the 1931 registry proceeding. On November 20, 1934, the District Director of Immigration and Naturalization filed objections to the granting of citizenship (R. 223), and on February 27, 1935, respondent consented to the dismissal of his petition for naturalization (R. 225).

On December 20, 1942, while serving in the United States Army, respondent executed a "Pre-

[2] A certificate of lawful arrival in this country was a prerequisite to naturalization.

liminary Form for Petition for Naturalization" (R. 185) under section 701 of the Nationality Act of 1940, as added by section 1001 of the Act of March 27, 1942, 56 Stat. 182, which granted special benefits to persons then serving in the armed forces who had "been lawfully admitted to the United States." [3] In a personal history

[3] Section 701 of the Nationality Act of 1940 provided:

"Notwithstanding the provisions of sections 303 and 326 of this Act, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, including its Territories and possessions, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon compliance with all the requirements of the naturalization laws except that (1) no declaration of intention and no period of residence within the United States or any State shall be required; (2) the petition for naturalization may be filed in any court having naturalization jurisdiction regardless of the residence of the petitioner; (3) the petitioner shall not be required to speak the English language, sign his petition in his own handwriting, or meet any educational test; and (4) no fee shall be charged or collected for making, filing, or docketing the petition for naturalization, or for the final hearing thereon, or for the certification of naturalization, if issued: *Provided, however*, That (1) there shall be included in the petition the affidavits of at least two credible witnesses, citizens of the United States, stating that each such witness personally knows the petitioner to be a person of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the United States, (2) the service of the petitioner in the military or naval forces of the United States shall be proved by affidavits, forming part of the petition, of at least two citizens of the United States, members or former members dur-

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statement signed on March 18, 1943, he admitted having a police record (R. 195). This personal history statement, the recommendation of respondent's commanding officer that his application to file a petition for naturalization be approved, and his preliminary form for naturalization were forwarded by his commanding officer to the Chief Examiner of the Immigration and Naturalization Service in Philadelphia, Pennsylvania (R. 186).

The preliminary form was then forwarded by the Philadelphia Office to the Records Unit of the New York District of the Immigration and Naturalization Service for verification of the statement of the respondent that he had lawfully entered the United States at the Port of New York on September 12, 1917 (R. 42). The Records Unit determined that respondent had de-

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ing the present war of the military or naval forces of the noncommissioned or warrant officer grade or higher (who may be the witnesses described in clause (1) of this proviso), or by a duly authenticated copy of the record of the executive department having custody of the record of petitioner's service, showing that the petitioner is or was during the present war a member serving honorably in such armed forces, and (3) the petition shall be filed not later than one year after the termination of the effective period of those titles of the Second War Powers Act, 1942, for which the effective period is specified in the last title thereof. The petitioner may be naturalized immediately if prior to the filing of the petition the petitioner and the witnesses required by the foregoing proviso shall have appeared before and been examined by a representative of the Immigration and Naturalization Service."

serted his ship (R. 49) and undergone a registry proceeding (R. 44). The record of the 1931 registry was found (R. 46, 203). Respondent's preliminary application was then sent to the Central Office of the Immigration and Naturalization Service for issuance of a certificate of arrival (R. 50). The certificate of arrival was issued by the Central Office on April 28, 1943, based upon the 1931 registry proceedings (R. 44–45, 83, 180). This certificate of arrival was required to be attached to and made a part of each petition for naturalization by section 332 (c) of the Nationality Act of 1940, 54 Stat. 1137, 1154, 8 U. S. C. (1946 ed.) 732 (c).

Respondent's file was then forwarded to a naturalization examiner, George Z. Reich, of the Philadelphia Office of the Immigration and Naturalization Service. From the record it appears that the file consisted of the preliminary application with the attached certificate of arrival (R. 82–83; Exhibit P–14, R. 185), the approval of the commanding officer (R. 85; Exhibit P–15, R. 186–187), the personal history statement of respondent (R. 85; Exhibit P–15, R. 188–197), and the record of the earlier naturalization proceeding which had been dismissed in 1935 (R. 82). The registry proceeding of 1931 was not a part of the file (R. 83). Mr. Reich said he knew there had been a registry proceeding from a symbol appearing on the certificate of arrival and that he could have requisitioned it (R. 101, 142).

Reich testified that he first looked at the file when he examined respondent at the Indian Gap Military Reservation on June 29, 1943, along with approximately 25 or 30 other applicants for citizenship (R. 77–78). The examination of the entire group took about three and one-half hours (R. 78). The examination of the respondent, including the reading of his file and questioning two witnesses, took approximately 30 minutes (R. 104). The examiner admitted he did not read the personal history statement (R. 93) in which respondent admitted that he had been to Canada many times (R. 194). Respondent told him under oath that he had not been absent from the country (R. 140). Mr. Reich did note that the file contained a record of arrests and an affidavit by respondent with respect thereto (R. 128). He questioned respondent as to each arrest and asked if there were any others (R. 128). His recommendation that naturalization be granted was predicated upon (1) his conclusion that there was no legal evidence in the file which would sustain an objection, (2) the fact that the arrests were outside the statutory period, being ten years before respondent's petition for naturalization, and (3) the fact the commanding officer recommended naturalization (R. 143).

The afternoon of the day respondent and the other applicants from his army post were examined by Mr. Reich, he travelled with them to Lebanon, Pennsylvania, the county seat of Lebanon

County where their petitions for naturalization were filed and presented to the Common Pleas Court (R. 179). Attached to respondent's petition was the aforementioned certificate of arrival (R. 179). The petition signed by respondent stated "My lawful admission to the United States, its Territories, or its possessions was at New York, N. Y. under the name of Umberto Anastasio on 9/12/17 on the SS Sardegna as shown by the certificate of my arrival attached to this petition" (R. 179). Mr. Reich appeared before the naturalization court and recommended that naturalization be granted, but he did not call the court's attention to any of the facts of the respondent's case (R. 112). The naturalization was granted that day (R. 112).

On the basis of the facts summarized above, the District Court found that the use of the required certificate of arrival in respondent's naturalization proceedings, based as it was upon the false record of registry in 1931, constituted a fraud upon the naturalization court (R. 15). The court also held that respondent's naturalization was illegally procured in that respondent had not complied with the statutory requirement of lawful admission to the United States (R. 21). The District Court ordered the certificate of naturalization cancelled and the order admitting respondent to citizenship set aside (R. 28).

The Court of Appeals, District Judge Lord dissenting, reversed and vacated the judgment of

the District Court (Appendix, *infra*, p. 47). Without discussing the issue of illegality, the majority held that the government must have realized that respondent had fraudulently obtained his record of registry in 1931 and that therefore the government was not deceived. This reasoning was predicated upon the fact that the government was aware in 1943, when the examiner recommended respondent's naturalization, that respondent had fraudulently concealed his criminal record in his New York naturalization proceedings in 1934–5 and had undergone a registry proceeding in 1931. The Court of Appeals also found that the respondent had not practiced fraud upon the government in 1943 since he could have obtained a new record of registry in 1943 based upon his then "good moral character", and had no reason to believe a new registry certificate was required.

Judge Lord expressed the view that the certificate of naturalization had been procured by fraud (Appendix, *infra*, pp. 37–46) in that the 1943 certificate of arrival was based upon the fraudulent registry proceedings in 1931 and was a necessary part of the petition for naturalization under the Nationality Act of 1940. He found that the record did not support the majority's view that the examiner, Reich, must have realized that respondent had fraudulently concealed his criminal record in his 1931 registry proceedings which were not in the file which Reich had. He felt that the government could not be estopped

to bring a charge of fraudulent naturalization because information concerning the fraud was somewhere in a file which was not brought to the attention of the examiner. Judge Lord was also of the view that the naturalization had been illegally procured since the statutory requirement of a valid certificate of arrival had not been met.

A petition for rehearing *en banc* was denied in a *per curiam* decision (Appendix, *infra*, p. 48). Judge Biggs, in a dissenting opinion in which Judges McLaughlin and Staley joined, noted that issues of grave consequence were involved, since the majority seemed to charge a naturalization court with constructive notice of a prior fraud committed by an applicant for citizenship which had not been called to its attention by the Immigration Service through negligence or erroneous judgment. The minority thought that the power of a court to protect the purity of the naturalization process could not be thus limited by the action of a minor executive official.

REASONS FOR GRANTING THE WRIT

The decision below holds that, because a naturalization examiner might with greater diligence have discovered petitioner's fraud upon the naturalization court, the "government" was not deceived into granting respondent his citizenship in 1943. As the dissenting judges below pointed out, this decision raises issues of "grave consequence" extending beyond this immediate case,

and indeed beyond questions of denaturalization. The majority opinion holds the "government" bound by the negligence or lack of judgment of a single minor employee, and specifically holds the decree of a court to be immune from correction for fraud even though the fraud is not brought to its attention. Such a holding has continuing importance in all fields of governmental activity since it makes the rights of the government as a whole dependent on the error of any subordinate employee. It undermines the very foundation of the denaturalization statute, which was, as this Court stated, designed "to afford cumulative protection against fraudulent or illegal naturalization." *United States* v. *Ness*, 245 U. S. 319, 327.

1. Before turning to these basic issues, we summarize the facts which demonstrate that there was affirmative fraud on respondent's part in the 1943 naturalization proceedings.

Respondent's petition for naturalization in 1943 stated: "My lawful admission to the United States, its territories, or its possessions was at New York, N. Y. under the name of Umberto Anastasio on 9/12/17 on the SS Sardegna as shown by the certificate of my arrival attached to this petition." (R. 179.) Respondent knew that, in actual fact, he had never been lawfully admitted to the United States. Under the law, the equivalent of lawful entry was a valid record of registry (*supra*, p. 4, fn. 1), but respondent

also knew that his record of registry had been obtained by deceit in 1931. The Court of Appeals felt this to be of no consequence since it assumed that he could have procured a new record of registry in 1943 based upon his then "good moral character." It is highly speculative, however, whether such a record would have been granted, since respondent had made numerous trips to Canada (a fact as to which he lied to the naturalization examiner) and it may well be that his entry from Canada rendered him deportable (see *United States ex rel. Volpe* v. *Smith,* 289 U. S. 422), and therefore not eligible to registry under the statute (*supra,* p. 4). The fact is, in any event, that petitioner did not attempt to obtain a new record of registry, but stated that he had been lawfully admitted, thus relying on the equivalent of lawful admission which he had previously obtained by deceit. The certificate of arrival, which he was required to and did incorporate by reference in his petition, was plainly based upon the spurious record of registry obtained in 1931. Respondent's fraud was thus twofold: he swore that he had been lawfully admitted to the United States, and he used as proof a certificate of arrival which was based on the fraudulent 1931 record of registry.

Postponing for a moment the question whether the knowledge of an examiner could excuse this fraud on the Government and the naturalization court, the fact is that nothing in the record indi-

cates that the examiner knew of the fraud used to procure the record of registry, as assumed by the Court of Appeals. The evidence points in the opposite direction. The 1931 registry proceedings were not a part of the file the inspector had (R. 83), and he cannot be held to have knowledge existing somewhere else in government files. *United States* v. *Accardo,* 208 F. 2d 632 (C. A. 3), certiorari denied, 347 U. S. 952; see also *Kiefer* v. *United States,* C. A. D. C., certiorari denied, January 9, 1956, No. 518, this Term. The examiner spent approximately thirty minutes reviewing respondent's file, and interviewing him and his witnesses (R. 104). He did not have much time to follow the trail of facts from which the Third Circuit drew its assumption that he must have known of the fraudulent 1931 registry proceeding. At most, the record shows that the examiner might have discovered the fraud if he had made a more thorough investigation. This is hardly the equivalent of actual knowledge.

2. But even if the examiner were in fact aware of the fraud, his fault cannot bind the government or the naturalization court so as to render the respondent immune from the consequences of his own fraud. This is, as the dissenting judges below pointed out, the gravest error of the majority opinion below—an error which, we submit, merits review and correction by this Court.

In the first place, the majority have elevated a single official to the status of "the government"

and have held that, since he was not misled, the "government" was not misled. But the knowledge of a subordinate official of the government should not preclude the government, on the theory of estoppel, from asserting fraud. Although subordinate officials represent the government in its everyday dealings, the government itself represents all the people. The government cannot take advantage of a wrong committed by one of its officers. *Moser* v. *United States,* 341 U. S. 41. Neither should a private individual benefit because a government officer has not fully safeguarded the public interest. The public has a right to be protected against the fraud of the few who may avail themselves of opportunities to gain privileges by the use of it. This right cannot be dissipated by error, negligence, or connivance on the part of subordinate officials. See, e. g., *Federal Crop Insurance Corporation* v. *Merrill,* 332 U. S. 380, 383–384; *United States* v. *Stewart,* 311 U. S. 60, 70; *Utah Power and Light Company* v. *United States,* 243 U. S. 389, 409.

This Court rejected a similar notion of estoppel in *United States* v. *Ness,* 245 U. S. 319, 325, a denaturalization suit in which an argument was made that an appearance on the part of the government in the naturalization proceeding to oppose the naturalization precluded it from subsequently seeking denaturalization. In words seemingly tailored for this case, the Court found (p. 327) that the right to appear in the naturalization suit and to bring denaturalization proceedings "were

designed to afford cumulative protection against fraudulent or illegal naturalization."

Furthermore, the negligence or error of the examiner can be charged *to the naturalization court*—which is the organ of a separate branch of the government—only by application of some theory of constructive notice. As salutary as this doctrine may be in a civil case where one person owes a duty of care to another, it has no place in a denaturalization proceeding where the interests of the public and the integrity of the court are to be safeguarded. If naturalization courts are to be held bound by such a constructive notice doctrine, the burden of full disclosure imposed on petitioners for citizenship will be shifted to naturalization examiners. And if a naturalization examiner has actual knowledge of a prior fraud, and negligently or deliberately withholds the fact from a naturalizing court, the court and the public will be without means of self-protection. Revocation of citizenship will come to depend on how artfully the alien practices his fraud rather than on the substantial public interest in barring or withdrawing citizenship thus obtained.

The majority below were thus clearly incorrect in imputing to the court which granted naturalization knowledge which could at most be imputed to the executive branch of the government. The decision simply disregards the fact, established by the record, that the naturalization court was

completely ignorant of respondent's criminal record and background and of the uncured illegality of his entry into this country. In short, the court ignored the basic principle that naturalization is a judicial proceeding in which only the court has ultimate power. *Tutun* v. *United States*, 270 U. S. 568.[4]

3. Aside from the question of fraud, the court below erred in holding that respondent did not obtain his citizenship illegally.[5] Reliance by respondent upon a certificate of arrival which was invalid because based upon a fraudulent registry proceeding rendered his naturalization proceeding fatally defective.

Naturalization petitioners are held to a strict compliance with statutory requirements. *Maney* v. *United States*, 278 U. S. 17; *United States* v. *Ness*, 245 U. S. 319; *United States* v. *Ginsberg*,

[4] There was a provision in the Nationality Act of 1940 providing for naturalization of soldiers by representatives of the Immigration and Naturalization Service if they were not within the jurisdiction of a naturalization court. Section 702 of the Nationality Act of 1940, as added by the Act of March 27, 1942, 56 Stat. 182. However, respondent was within the jurisdiction of a court capable of naturalizing an alien and so that section had no pertinence as to him.

[5] Since illegality is not a separate ground for revocation in the Immigration and Nationality Act of 1952 (Section 340 (a), 8 U. S. C. 1451 (a)), this issue, in itself, might not have been made the basis for a petition for certiorari. In this context, however, it is not only an additional ground for reversal, but serves to point up further the broad implications of holding knowledge of a subordinate official to be a ground for condoning unlawful actions.

243 U. S. 472, 475. Each of these cases was a denaturalization suit, and this Court held unequivocally in *Ness* and *Maney* that failure to attach a proper certificate of arrival invalidated the naturalization. In *Ginsberg*, the Court revoked a naturalization as illegally procured because it was granted in chambers rather than in open court and because residence requirements were not met. In each of those cases, the Court dismissed as of no consequence good faith on the part of the naturalization petitioner and negligence on the part of government officials.

Since respondent was required to have a valid certificate of arrival attached to his petition for citizenship to verify his lawful admission (Section 332 (c) of the Nationality Act of 1940, 54 Stat. 1137, 1154, 8 U. S. C. (1946 ed.) 732 (c)), failure to attach a valid one rendered his naturalization vulnerable to attack on the grounds of illegal procurement.

CONCLUSION

The decision below is erroneous and rests on several novel premises. It will hamper the government in bringing charges of fraud when one of its officers had knowledge of the facts and will permit naturalization petitioners successfully to perpetrate fraud on the courts. It is therefore

respectfully submitted that the petition for a writ of certiorari should be granted.

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FEBRUARY 1956.

APPENDIX

United States Court of Appeals for the Third Circuit

No. 11350

UNITED STATES OF AMERICA

v.

UMBERTO ANASTASIO, ALSO KNOWN AS ALBERT ANASTASIA, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Argued December 20, 1954

Before GOODRICH and KALODNER, *Circuit Judges*, and LORD, *District Judge*

Opinion of the Court

(Filed September 19, 1955)

By KALODNER, *Circuit Judge:*

Defendant is a native of Italy. On June 29, 1943 the Common Pleas Court of Lebanon County, Pennsylvania entered its order admitting him to citizenship and issued a certificate of naturalization to him. Almost ten years later, on December 9, 1952, the United States instituted proceedings under Section 338 (a) of the Nationality Act of 1940, 54 Stat. 1137, 1158, 8 U. S. C. Sec. 738 (a) to set aside the naturalization decree and cancel

the certificate of naturalization on the ground that the latter had been illegally procured and was based on a fraudulent Certificate of Registry issued to defendant in 1931. The District Court for the District of New Jersey entered an order cancelling the defendant's certificate and revoking the order admitting him to citizenship, 120 F. Supp. 435 (1954). The defendant thereupon filed the instant appeal.

To begin at the beginning.

On September 12, 1917, the defendant, then a 15-year-old "aspiring seamen" on the S. S. *Sardegna,* of foreign registry, arrived at the Port of New York and was granted shore leave. He failed to return to his ship and twelve days later was listed as a deserting seaman. Thereafter, he made his home in the United States.

On April 4, 1931, defendant made application for a Certificate of Registry under the Act of March 2, 1929, 45 Stat. 1512. In his application, he stated in part as follows: "I have never been arrested, summoned into court as a defendant, convicted, fined, imprisoned, or placed on probation, or forfeited collateral for an act involving a felony, misdemeanor, or breach of any public ordinance." On May 5, 1931, before an Immigration Inspector, the defendant testified under oath that he had never been arrested nor subjected to criminal or civil prosecution. On the basis of the record as stated, a Certificate of Registry was issued on June 19, 1931. Evidence in the present record discloses that defendant had in fact been arrested five times prior to his filing the "Application for Registry."

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Subsequently, on October 30, 1931, the defendant filed a formal Declaration of Intention ("first papers") in the United States District Court for the Eastern District of New York; on November 16, 1933 he filed "Application for a Certificate of Arrival and Preliminary Form of Petition for Citizenship" and in response to a question therein "Have you ever been arrested or charged with violation of any law of the United States or state or any city ordinance or traffic violation" he answered "Yes * * * convicted of misdemeanor in 1923 * * * traffic tickets but does not recall dates"; on December 27, 1933 he filed his "Petition for Citizenship" to which was attached the Declaration of Intention to become a citizen of the United States and a Certificate of Arrival, issued in 1933, which was based on the 1931 Record of Registry proceedings; on March 1, 1934 defendant executed and gave to the government an affidavit in which he admitted that he had concealed his criminal record; on November 20, 1934, the District Director of Immigration and Naturalization filed "Opposition by United States to Granting of Citizenship", reciting inter alia, the defendant's concealment of his criminal record in his interrogation by a United States Naturalization Examiner on December 27, 1933; on February 27, 1935, defendant filed "Consent of Dismissal of Petition for Naturalization."

In 1943, the defendant, then in the United States Army, asked the permission of his Commanding Officer to institute naturalization proceedings under provisions relating to servicemen by filing a "Preliminary Form for Petition for Naturalization" which he had executed on De-

cember 30, 1942. The defendant filled out a required ten-page "Personal History Statement" on March 18, 1943, which disclosed that he had a police record. The defendant's Commanding Officer approved the defendant's application to file his petition for naturalization and transmitted it with his approval to the Chief Examiner of the Immigration and Naturalization Service at Philadelphia, Pennsylvania.

Subsequently the defendant's application was sent to the Records and Verification Division of the Immigration and Naturalization Service, which maintains arrival records at the Port of New York. There the crew list of the ship upon which the defendant had arrived was located. The verification clerk made the following entry on April 23, 1943, on the reverse side of defendant's application: "Data taken from Crew List—Deserting Seaman—No record of admission for permanent residence."

On April 28, 1943, a "Certificate of Arrival" was issued to the defendant. The Immigration and Naturalization Service then forwarded to George C. Reich, a designated examiner, its file relating to the defendant's original naturalization proceedings in 1931–1935 (which had been abandoned) and the then current 1943 proceedings. Reich, on June 29, 1943, proceeded to Indiantown Gap, Pennsylvania, where the defendant was stationed, and orally examined him with respect to his application.

Reich's testimony in the denaturalization proceedings in the District Court with respect to his examination of the defendant, is most illuminating.

Its highlights follow:

> Reich *had with him the file* of the Immigration and Naturalization Service relating to the 1931–1935 and 1943 naturalization proceedings when he examined the defendant.[1]
>
> The file contained police records of the defendant's arrests which he had fraudulently concealed in his 1931 application.[2]
>
> Reich examined the defendant in detail with respect to his criminal record as it appeared in the file.[3]

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[1] "A. I carried the file from our office in Philadelphia to Indiantown Gap where the examination was conducted." N. T. pp. 64–65.

[2] "Q. Did it (the file) contain any police records from any governmental agencies enumerating any arrests of the defendant?

"A. It did, the New York prior petition file contained a record submitted by the New York Police Department to our office.

"Q. You distinctly recall that there was such a police report in the file?

"A. Yes, sir; I do." N. T. pp. 88–89.

[3] "Q. Did you review with Mr. Anastasio the arrests disclosed in the '33 or '34 file?

"A. Yes, sir; I did." N. T. p. 71.

* * * * *

"Q. Do you recall specifically the questions concerning his criminal record which you put to him and the answers which he gave to you?

"A. Yes, sir." N. T. p. 106.

* * * * *

"Q. Now, you read him a list of arrests, is that correct?

"A. That is correct.

"Q. What were you reading from?

"A. I was reading from a record in the file listing his arrests." N. T. p. 108.

Reich "knew" that the file contained an affidavit which the defendant had executed and given to the government March 1, 1934, in which he admitted that he had concealed his criminal record.[4]

Reich "knew" from the file that the defendant had been issued a Certificate of Registry and a Certificate of Arrival and that a new Certificate of Arrival was issued him in 1943 supplanting the earlier arrival certificate.[5]

Reich "knew" when he examined the defendant that he originally entered the United States as a "deserting seaman."[6]

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[4] "A. The * * * file contained * * * an affidavit by the petitioner as to his own arrests at the time the New York file was pending." N. T. p. 134.

[5] "Q. Was there a certificate of arrival attached to the petition (the 1943 petition) when you got it?

"A. When the application was reviewed by me there was a certificate of arrival attached to the application file."

* * * * *

"Q. Is there anything on that certificate of arrival which indicates to you that it was issued on the basis of a registry proceeding?

"A. Yes, sir; this copy shows *certificate of arrival previously issued under No. 2R. The R signifies it was pursuant to a registry proceeding.*" N. T. pp. 71, 72–73. [Emphasis supplied.]

[6] "Q. Now at the time of the naturalization in 1943 did you pay any particular attention to the Wilkerson notation on there (the 1943 file) that Mr. Anastasio had been a deserting seaman?

"A. I saw it." N. T., p. 153 (Wilkerson was the verification clerk in the Records Division of the Ellis Island office of the Immigration and Naturalization office who processed the defendant's 1943 naturalization petition and who noted thereon, on April 23, 1943, that he was a "deserting seaman").

Reich spent "more time on the review" of the defendant's naturalization files (1931–35 and 1943) and on "his examination" of the defendant than on the "average case" at the Indiantown Gap interview.[7]

Reich "knew", from his "complete" examination of the "entire file" before he examined the defendant, that his earlier attempt at naturalization in 1931–35 in New York had been "denied".[8]

Reich recommended that the defendant's application be granted because he was of the opinion "that there was no legal evidence in the file which would sustain an objection"; the defendant's various arrests "disclosed * * * or uncovered in 1934" were at the time "outside the statutory

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[7] "Q. Now did you spend any more time on the review of this man's file and your examination of him than you did on the average case that day?

"A. Yes; I did." N. T., p. 154.

[8] "Q. Now, do you recall what constituted the file that was in your hands when this interview took place?

"A. Yes; I had the Philadelphia file, which to my recollection consisted of his application for naturalization and the approval of his commanding officer for naturalization; *together with a New York petition for naturalization* filed, which was *a denied petition.* That is all.

"Q. Did you examine the file in advance of the interview?

"A. The applicant was standing in front of me while I examined the file, before I started the interview. Before I said anything to him *I examined the file completely.*

"Q. You read over the entire file before you began to interrogate him?

"A. I examined the file. I didn't read every word of the file." Deposition of Reich, December 17, 1953, pp. 21–22. [Emphasis supplied.]

period and the defendant's commanding officer had approved his application."*

On the record as stated the District Court found (Finding of Fact VIII) "The Certificate of Arrival (granted on April 28, 1943) had its origin in the false record of registry (issued in 1931) * * * theretofore made by the defendant, and therefore its use in the naturalization proceedings (in 1943) was a fraud upon the Court. *The fraud tainted every step of the naturalization proceedings* (from 1931 to 1943)." [Emphasis supplied.]

We are of the opinion that the District Court erred in its determination. On the score of the latter it must be observed that the District Court made no findings with respect to Reich's testimony and its impact upon the critical issue as to whether

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*"Q. Now you made a recommendation of 'Grant' in his case, didn't you?

"A. That is correct.

"Q. Will you tell us, please, what it was that motivated your recommendation of 'Grant'?

"A. I felt there was no legal evidence in the file which would sustain an objection.

"Q. That these arrests which had been disclosed in 1934, or uncovered in 1934, that they had been outside the statutory period?

"A. Yes, sir; they were 10 years prior to the time of the defendant's petition for naturalization.

"Q. Did the recommendation of the commanding officer concerning approval of this man's application for citizenship in any way affect your thinking?

"A. Very definitely. It showed that he had been serving honorably in the armed forces of the United States, and from other parts of the file, he had been serving for almost a year at that time." N. T., pp. 154–155.

the government had been defrauded in 1943 in recommending the defendant's naturalization.

A denaturalization proceeding is essentially an action for recission. As in all recission actions, the government in order to prevail must establish that (1) the defendant was guilty of fraud or misrepresentation and (2) it was deceived thereby.

In our opinion the record fails to establish the government was deceived into granting the defendant citizenship in 1943 pursuant to the independent naturalization proceeding which he instituted that year.

Moreover, we believe the record affirmatively establishes by the undisputed testimony of the government's key witness, and the inferences inevitably flowing from that testimony, that the defendent did not in 1943 practice fraud or illegality upon the government.

With respect to denaturalization proceedings these principles are well-settled:

The premise of a denaturalization action is fraud or illegality allegedly practiced by the defendant in the naturalization proceeding which deceived the government or the court into granting citizenship.[10]

The burden is on the government to establish by "clear, unequivocal and convincing evidence which does not leave 'the issue in doubt'" that the defendant has been guilty of fraud or illegal conduct in his naturalization proceeding.[11]

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[10] *Knauer* v. *United States*, 328 U. S. 654 (1946).

[11] *Schneiderman* v. *United States*, 320 U. S. 118, 158 (1943); *Klaprott* v. *United States*, 335 U. S. 601, 612 (1949).

There must be a "* * * solidity of proof which leaves no troubling doubt in deciding a question of such gravity as is implied in an attempt to reduce a person to the status of alien from that of citizen."[12]

In a denaturalization case "* * * the facts and the law should be construed as far as is reasonably possible in favor of the citizen."[13]

An essential element of fraud is that the complaining party must have been deceived by the fraudulent statements of the accused. If this element is lacking the accused has failed in his purpose to defraud.[14]

Applying these principles to the instant case it is obvious that the government has failed to establish by the strict burden of proof imposed upon it that the defendant had "deceived" it into recommending citizenship in 1943.

To begin with, the government does not dispute that the record conclusively established that when it recommended granting of citizenship to the defendant in 1943 it then knew these facts: the defendant had originally entered the United States as a "deserting seaman"; he had fraudulently concealed his criminal record in his New York naturalization proceedings a decade earlier; he had confessed his fraud in an affidavit in 1934; the government, because of his fraud, had denied his naturalization petition and had further opposed the defendant's court proceedings insti-

[12] *Baumgartner* v. *United States*, 322 U. S. 665, 670 (1944).

[13] *Schneiderman* v. *United States*, *supra*, note 11.

[14] 23 Am. Jur. on Fraud and Deceit, Sec. 20; *Equitable Life Ins. Co. of Iowa* v. *Halsey, Stuart & Co.*, 112 F. 2d 303, 308 (7th Cir. 1940).

tuted in 1934 in an effort to win his citizenship; this opposition had resulted in the defendant's formal consent, in 1935, to a dismissal of his naturalization petition in the then pending court action.

Further, the government does not dispute that it had in the course of processing the defendant's 1943 naturalization petition, ascertained that (1) a Certificate of Arrival had been issued to the defendant in 1933 pursuant to his application for such a certificate in his Preliminary Form For Petition for Citizenship No. 2-171106 filed November 16, 1933; (2) a Certificate of Registry had been issued to the defendant on June 16, 1931;[15] and (3) it had *at its own instance* and *not upon any application made by the defendant* in connection with his 1943 petition for citizenship, issued a new Certificate of Arrival on April 28, 1943.

Parenthetically, it should be noted that the Preliminary Form for Petition for Naturalization executed by the defendant on December 30, 1942, made no reference to either a Record of Registry, Certificate of Registry or Certificate of Arrival; that the government conceded that in

[15] The record in the denaturalization proceedings disclosed that the government had ascertained in its investiagtion of the defendant's application for registry in 1931 that he had made an "illegal entry" into the United States; that he had been listed "as deserting" by the vessel on which he had been employed as a seaman; that in his application for registry the defendant stated that he had "never been arrested * * * convicted, fined, imprisoned, etc."; that the defendant had testified at a hearing on his application for registery that he had never been arrested, convicted, etc.

servicemen's naturalization proceedings it normally issued a qualified Certificate of Arrival where there had not been "a lawful admission for permanent residence";[16] that the only reason such a qualified Certificate had not been issued in the instant case was because the government's records disclosed there had been a registry proceeding in 1931. On the latter score Reich testified, in connection with his previously stated testimony that he knew the 1943 Certificate of Arrival was based on a registry record, that he

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[16] Testimony of Bernard J. Kelley, Supervisor of the Records Unit, New York District, Immigration and Naturalization Service in 1943, a government witness (N. T. pp. 43-44-45):

"Q. As a matter of practice if form 403 were submitted by a soldier, would show that he had entered the United States in a temporary status, such as a seaman, and your further search of your records indicated that there had never been a record created of registry, what would your practice then be?

"A. Instead; of the application being forwarded to the Central Office, as it was in a registry case, it would have been returned to the office of origin with the verification of arrival.

"Q. In such a case do you know whether a certificate of arrival would issue?

"A. It was the practice to issue qualified certificate of arrival and in those cases subject to the acceptance of the naturalization examiner.

"Q. Was your office at that time, or were you, under instructions from superior officers to issue certificates of arrival in the case of soldiers where the only record showed entry as a seaman?

"A. It was the practice to issue a formal certificate of arrival, qualified to indicate that it wasn't a lawful admission for permanent residence."

had not checked the latter although he could have done so had he desired."

The government (1) was fully aware that the defendant had, in the New York naturalization proceedings, fraudulently concealed his full arrest and criminal record when he filed his application for a Certificate of Arrival contemporaneously with his filing of preliminary petition for citizenship in 1933 since the "Application For A Certificate of Arrival and Preliminary Form For Petition For Citizenship" appear in a single document (Form A-2214)[11] and that it had successfully opposed the defendant's naturalization at that time because of the defendant's fraud; (2) it was fully aware in the 1943 naturalization of what had transpired in the New York proceedings; (3) it was fully aware of the existence of the 1931 registry proceedings and the government must have realized both in the New York proceedings and in 1943 that the defendant had committed the same fraud in his registry proceedings with respect to concealment of his criminal record as he did in his Form A-2214, otherwise the government would not have issued a Certificate of Registry.

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[11] "Q. Did you requisition the registry file?

"A. I did not.

"Q. Did you have the authority to requisition the registry file?

"A. I did." (N. T. p. 97.)

[11] In filling out Form A-2214 the defendant stated he had *not* been examined by United States immigration officials when he entered this country; that he had *not* paid a head tax; that he had no criminal record other than a conviction "of misdemeanor in 1923" and some traffic violations.

Reich was an experienced naturalization examiner when he interviewed the defendant in 1943 and recommended granting of his petition for naturalization. He had been appointed to that office in 1939 and between that time and his examination of the defendant had processed between 8,000 and 9,000 naturalization examinations. He must have realized, as did the various offices of the Immigration and Naturalization Service which processed the defendant's New York and 1943 applications, that the defendant had fraudulently concealed his criminal record in his registry proceedings in 1931 (as he did in his New York proceeding) else he would not have been granted his Registry Certificate.

In the light of these circumstances how can it be said that the government was the "victim" of any fraud on the part of the defendant when it recommended his naturalization in 1943? It specifically knew of the fraud committed in his New York proceedings; it specifically knew of his full criminal record. There is no actionable fraud if before any change occurs in the relationship of the parties the accused himself discloses the information that earlier misrepresentations which he had made were false, for if a new relation is effected subsequent to such disclosure the legal status of that relationship is the same as if the fraudulent statement had never been made.

The government inescapably finds itself in an inequitable position when it is realized that a new record of registry would have been issued in 1943 upon the defendant's application since the only requirement he would have had to meet related to

his then "good moral character" and Reich had attested to its existence when he recommended the defendant's naturalization on the ground that "there was no legal evidence in the file which would sustain an objection" since the defendant's criminal record was "outside the statutory period" and had been made "10 years prior to the time of the defendant's petition for naturalization". If the defendant's more than 10-year old criminal record did not create a bar to naturalization it follows that it would have not barred granting of a new registry.

Moreover, the defendant had no reason to believe that a new registry certificate was required. He had acquitted himself of the duty to divulge *all* relevant information to the government. He was entitled to assume that his case now rested with the government and that it would inform him of any infirmity in his application and if necessary oppose his naturalization on the basis of such infirmity.

It must be remembered that we are here concerned not with a naturalization proceeding where a privilege is sought, but with an action to denaturalize. As such the burden lies heavily with the government to cut square corners. The Supreme Court has spoken clearly and often on the independent close scrutiny that courts should make in such proceedings. *Schneiderman* v. *United States,* 320 U. S. 118, 122 (1943); *Klaprott* v. *United States,* 335 U. S. 601, 612 (1949).

Furthermore it is relevant to note that the defendant was naturalized under the liberal provisions of the Nationality Act of 1940, designed

specifically for those in the armed forces.[19] This circumstance strengthens our conviction that the government has established no tenable basis for this action.

We are fully aware of the unsavory background of this particular defendant. But the very fact that *extrinsic* considerations may operate to make the government zealous in its prosecution should make the courts equally zealous to see that there be conformance to the letter and spirit of the naturalization laws.

No criticism is implied of the Justice Department's "deportation program" with respect to naturalized racketeers, noted in the Supreme Court's recent opinion in Shaughnessy v. Accardi, decided May 23, 1955, but no matter how worthy the cause or its objective, the courts cannot lose sight of the fact that this is a government by law and not men nor against men.

The courts must be less concerned with what one undesirable citizen can do if he is permitted to retain this citizenship and residence in this country than with what one bad precedent-making decision can do.[20]

For the reasons stated the judgment of the District Court will be reversed and vacated.

LORD, *District Judge,* dissenting.

Defendant has argued many issues on his appeal. However, there is only one real question

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[19] Para. (5) of a Stipulation filed by the parties in the District Court disclosed that the defendant had enlisted in the Army on July 20, 1942, and was honorably discharged November 22, 1944, with the rank of Sergeant.

[20] The Defendant recently pleaded guilty to income tax evasion and was sentenced to imprisonment for one year.

to be determined, and that is: was the Certificate of Naturalization procured by fraud? In the determination of this issue, it is necessary to decide whether the Certificate of Registry was a part of the naturalization proceeding.

What "naturalization proceedings" were required in this case? Defendant's application for citizenship in 1942 was controlled by the Nationality Act of 1940, 8 U. S. C. 501–907, as amended, 8 U. S. C. 1001 (1942 Supp.). Section 1001 provides:

> Notwithstanding the provisions of sections 703 and 726 of this title, any person not a citizen, regardless of age, who has served or hereafter serves honorably in the military or naval forces of the United States during the present war and who, having been lawfully admitted to the United States, * * *, shall have been at the time of his enlistment or induction a resident thereof, may be naturalized upon *compliance with all the requirements of the naturalization laws* except that * * * [Emphasis supplied.]

The necessity to attach a Certificate of Arrival to the petition for naturalization was not eliminated by any of the exceptions noted in the Act. Such Certificate of Arrival was required under the Naturalization Act (1940) in effect at the time defendant applied for citizenship, 8 U. S. C. 732 (c) (1940),[21] and therefore was a necessary part

[21] "At the time of filing the petition for naturalization there shall be filed with the clerk of court a certificate from the Service, if the petitioner arrived in the United States after June 29, 1906, stating the date, place, and manner of

of defendant's naturalization proceedings in 1942 and 1943.

The evidence in the record indicates that the Certificate of Arrival attached to defendant's petition for citizenship was based on the fraudulent Application for Registry made by defendant in 1931. There can be no doubt that defendant needed a Record of Registry and Certificate of Arrival for his original naturalization proceedings initiated in 1931. See pertinent provisions of the Act of June 29, 1906, 34 Stat. 596,[22] as amended by the Act of March 2, 1929, 45 Stat. 1512.[23] The substance of these requirements appear also in the Nationality Act of 1940, 8 U. S. C. 728, 729.

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petitioner's arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition."

[22] Section 1 of the Act of June 29, 1906: "That it shall be the duty of the said Bureau to provide, for use at the various immigration stations throughout the United States, books of records, wherein the commissioners of immigration shall cause a registry to be made in the case of each alien arriving in the United States from and after the passage of this Act of the name, age, occupation, personal description * * *, the place of birth, the last residence, the intended place of residence in the United States, and the date of arrival of said alien, and, if entered through a port, the name of the vessel in which he comes. And it shall be the duty of said commissioners of immigration to cause to be granted to such alien a certificate of such registry, with the particulars thereof."

[23] "That * * * the registry of aliens at ports of entry required by section 1 of the Act of June 29, 1906, * * * as amended, may be made as to any alien not ineligible to citizenship in whose case there is no record of admission for permanent residence, if such alien shall make a satisfactory showing to the Commissioner General of Immigration, in accordance

A reading of the statutory requirements clearly reveals the necessity for a Certificate of Arrival. *United States* v. *Ness*, 245 U. S. 319 (1917); *Maney* v. *United States*, 278 U. S. 17 (1928). That the Certificate of Arrival was based on the Record of Registry is also clear by the evidence revealed in the record and by the fact that such procedure was required under Section 2 of the Act of March 2, 1929, 45 Stat. 1512, *supra*, footnote 3.

It is true, as the majority points out, the crew-list substantiates the necessary information on the Certificate of Arrival. However, the Record of Registry was required (when defendant in 1931 applied for citizenship) under the Act of Mar. 2, 1929, 45 Stat. 1512, before a Certificate of Arrival

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with regulations prescribed by the Commissioner General of Immigration, with the approval of the Secretary of Labor, that he—

(1) Entered the United States prior to June 3, 1921;

(2) Has resided in the United States continuously since such entry;

(3) Is a person of good moral character; and,

(4) Is not subject to deportation.

* * * * *

"SEC. 2. Upon the making of a record of registry as authorized by section 1 of this Act, the certificate of arrival required by the fourth paragraph of the second subdivision of section 4 of such Act of June 29, 1906, as amended, may be issued upon application to the Commissioner of Naturalization, in accordance with regulations prescribed by the Commissioner of Naturalization with the approval of the Secretary of Labor, and upon payment of the fee prescribed by section 5 of this Act.

"SEC. 3. For the purposes of the immigration laws and the naturalization laws an alien, in respect of whom a record of registry has been made as authorized by section 1 of this Act, shall be deemed to have been lawfully admitted to the United States for permanent residence as of the date of his entry."

could be given. Thus it follows that the court below was correct in its finding that the Certificate of Arrival had its origin in the fraudulent Record of Registry made by the defendant. The fraud in the original proceeding permeated the subsequent issuance of the Certificate of Arrival which was attached to defendant's naturalization petition in 1943. Defendant's contention that a Record of Registry would not have been necessary for the issuance of a Certificate of Arrival is without substance, because, in fact, the Certificate of Arrival *was* based on the Record of Registry in this case. Since the Record of Registry was procured by fraud, it follows that the Certificate of Arrival was tainted with the same fraud.

As indicated by the majority opinion, Reich's testimony is important. However, in *support* of the District Court's finding that the Certificate of Arrival had its origin in the fraudulent Record of Registry, the following highlights of Reich's testimony should not be ignored:

> Reich did not have the *complete file* relating to the 1931–1935 naturalization proceedings when he examined the defendant, and, particularly, *did not have the registry file.*[24]

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[24] "Q. Was there a certificate of arrival attached to the petition when you got it?

"A. There was a certificate of arrival——" (N. T., p. 71.)

* * * * *

"Q. On top of that it indicates that a similar certificate of registry had been issued at another time in connection with this New York naturalization application?

"A. That is correct.

"Q. Now, did you have the registry file before you at that time?

"A. No, sir; I did not." (N. T., p. 72.)

Reich's office was not part of the New York Office.[25]

While Reich knew of the affidavit made by the defendant in 1934, it merely recited instances of prior arrests and the fact that such arrests were not stated to a previous examiner in 1933. However, the affidavit was made *after* the Application for Registry was filed in 1931 and *after* defendant had given false answers to the Registry inspector as a result of which the Certificate of Registry was granted in 1931. There is *nothing in the affidavit* to show a concealment in the Record of Registry since the affidavit referred only to the naturalization proceedings in 1933.[26]

Reich spent only 15 minutes reviewing the file of defendant and only 10 minutes of oral examination before recommending the granting of citizenship.[27]

Reich's recommendation to grant defendant's application was based only on evi-

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[25] "Q. Incidentally, at that time you were attached to the Philadelphia Field Office?

"A. That is correct.

"Q. And that is separate and apart and distinct from the Central Office?

"A. That is correct." (N. T., p. 75.)

[26] Exhibit P–13:

* * * * *

"That during the course of his examination deponent was asked various questions as to his eligibility for naturalization and at that time was also asked if he had ever been arrested or convicted of any crime. Deponent stated to the naturalization examiner that * * *"

[27] "Q. How much time did you spend examining his file?

"A. Fifteen minutes.

"Q. That means you questioned him for about 10 minutes?

"A. That's right." (N. T., pp. 101–102.)

dence before him which *did not include the Registry Certificate.*[28]

While the officers of the Naturalization Service knew of the previous arrests about which defendant was truthful in 1943, these were discounted *then* because they occurred ten years prior to 1943 and were outside the statutory period. However, the fact remains that the petition for naturalization was granted on the basis of the 1943 examination of defendant *and* the 1931 Registry Certificate *which was fraudulently obtained.* Defendant's subsequent revelations of his arrest record did not purge the original fraud.

The Government examiner, while knowing of the defendant's criminal record in 1943, *did not know* that the defendant had affirmatively concealed his arrests in the 1931 Record of Registry, on which the examiner relied. True, somewhere in the files of the New York Central Office of the Immigration and Naturalization Office the information was available, but the official (Reich) who recommended approval of the naturalization in 1943 (over twelve years after the fraudulent Record of Registry) did not know of the fraud and was deceived thereby. Can it be said that the Government should be estopped now in its charge of fraudulent naturalization because the information concerning the fraud was somewhere in a twelve-year-old file which was not brought to the attention of the examiner? The fraud still had

[28] "Q. Will you tell us, please, what it was that motivated your recommendation of 'Grant'?" * * *

"A. I felt that there was no legal evidence *in the file* which would sustain an objection." (N. T., p. 154.) [Emphasis added.]

been perpetrated on the Government and defendant's citizenship was granted partly on the basis of the fraudulent Record of Registry which the examiner did not have before him in 1943. The fraud was never condoned by such action.

The majority states that:

> * * * He [Reich] must have realized, * * * that the defendant had fraudulently concealed his criminal record in his registry proceeding in 1931 * * * else he would not have been granted his Registry Certificate.

I can find nothing in the record to justify this conclusion.

Reich attested to defendant's then "good moral character" in 1943 on the ground that "there was no legal evidence *in the file* which would sustain an objection" (emphasis supplied), since the defendant's criminal record was then "outside the statutory period." The majority argues that a new registry could have been secured on such a record in 1943. But the facts are that no new registry proceeding was conducted. The old fraudulent Registry Record was used. Reich did not have in his file the records of the old Registry Record. As careless and inefficient as this may appear, the act of proceeding on an *incomplete* file should not bar the Government from reconsidering the case in the future, when all the information is assembled properly.

Citizenship is a privilege that should be jealously guarded, and the defendant did not meet the requirements of entire good faith. He was definitely benefited in the granting of his application by the fraudulent Record of Registry

on which the Certificate of Arrival was based. The Government had a right to rely on the statements of the defendant when the 1931 Registry Certificate was granted. It had no burden in 1943 to ascertain whether the defendant had been untruthful during the previous proceedings in 1931 which the majority opinion holds.

True it is, as the majority points out, that the burden of proof in a de-naturalization proceeding is admittedly greater than in an application for citizenship. Where a petitioner, in his original application for citizenship falsely denies being arrested or charged with violations of any law, such false statements of themselves involve moral turpitude and exhibit the unfitness of the applicant for the high privilege of citizenship. *Del Guercio* v. *Pupko,* 160 F. 2d 799 (9th Cir. 1947). A fortiori, if an applicant is refused citizenship because the Government has knowledge of the false statement, should any naturalized person be permitted to keep his citizenship as a reward for having been successful in his deceit? It is a fair statement to say that the defendant knew and realized the significance of his prior deceit when he withdrew his initial application. Since the information then requested was deliberately concealed, and a truthful answer then might possibly have prevented defendant from obtaining his citizenship in the first instance, the misrepresentation continued in his case and was present throughout the subsequent proceedings.

It would appear to be clear that the naturalization was illegally procured. It is evident that the Record of Registry was induced by fraud. The failure of the defendant to reveal his arrests

was certainly sufficient cause for revocation of a certificate of naturalization. *Brenci* v. *United States,* 175 F. 2d 90 (1st Cir. 1949); *United States* v. *Saracino,* 43 F. 2d 76 (3rd Cir. 1930); *United States* v. *Accardo,* 113 F. Supp. 783 (D. N. J. 1953), aff'd., 208 F. 2d 632 (3rd Cir. 1953), cert. den., 347 U. S. 952 (1954). Such deceitful conduct of the defendant colored the entire naturalization proceeding.

Consequently, the statutory requirement of a valid Certificate of Arrival was not met by the defendant. As such, he has no right to naturalization. *United States* v. *Ginsberg,* 243 U. S. 472, 475 (1917); *Maney* v. *United States,* 278 U. S. 17, 22 (1928).

I would affirm the judgment of the district court.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

United States Court of Appeals for the Third Circuit

No. 11350

UNITED STATES OF AMERICA

v.

UMBERTO ANASTASIO, ALSO KNOWN AS ALBERT ANASTASIA, APPELLANT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Present: GOODRICH and KALODNER, *Circuit Judges*, and LORD, *District Judge*

Judgment

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby reversed, and the cause remanded with instructions to vacate the order cancelling defendant's certificate of naturalization and to reinstate the order admitting him to citizenship.

By the Court:

KALODNER,
Circuit Judge.

SEPTEMBER 19, 1955.

Received and filed September 19, 1955.
IDA O. CRESKOFF,
Clerk.

United States Court of Appeals for the Third Circuit

No. 11350

UNITED STATES OF AMERICA

v.

UMBERTO ANASTASIO, ALSO KNOWN AS ALBERT ANASTASIA, APPELLANT

ON PETITION FOR REHEARING

Before BIGGS, *Chief Judge,* and MARIS, GOODRICH, MCLAUGHLIN, KALODNER, STALEY and HASTIE, *Circuit Judges*

Opinion of the Court

(Filed November 16, 1955)

PER CURIAM:

The petition for rehearing raises no issue not previously considered and correctly decided. On the facts of this case we do not regard our prior decision in *United States* v. *Accardo,* 208 F. 2d 632 (1954), cert. den., 347 U. S. 952 (1954) as requiring a contrary result.

Accordingly, the petition for rehearing is hereby denied.

BIGGS, *Chief Judge,* dissenting.

I am forced to the conclusion that the petition for rehearing should be granted and that the appeal should be heard by the full court. The present decision is contrary to our *per curiam* affirmance of United States v. Accardo, 208 F. 2d 632 (1954), cert. den., 347 U. S. 952 (1954),

and seems to charge a naturalization court with a kind of constructive notice of any prior fraud or fraud committed by an applicant for citizenship. If a naturalization examiner negligently is unaware of a fraud committed by the applicant, or if the examiner, in the exercise of his own judgment erroneously deems the fraud to be inoperative or insufficient to prevent naturalization, the examiner's negligence or error under the present ruling seems to be imputable to the naturalization court itself. But the naturalization examiner is an arm of the federal executive and unconnected with the judiciary, state or federal. An error of negligence or judgment committed by the executive cannot properly be imputed to the judicial branch. The principle enunciated by this court would seem to estop the executive under circumstances such as those at bar from raising the issue of fraud and also would prevent a federal court from exercising the power to cancel a certificate of naturalization conferred on it by Congress.

These issues are of grave consequence. I dissent from the denial of the petition for rehearing before the court en banc.

McLaughlin, J. and Staley, J. join in the above dissent.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

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